IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Guy Mason,	:	
Plaintiff,	:	
v.	:	Case No. 2:14-cv-446
Wal-Mart Corporation, et al.,	:	JUDGE ALGENON L. MARBLEY Magistrate Judge Kemp
Defendants.	:	

OPINION AND ORDER

Plaintiff Guy Mason filed this civil rights action after he was stopped and arrested after leaving a Wal-Mart located in Steubenville, Ohio. According to the complaint, Mr. Mason was taken back to the store, accused of theft, had his property taken from his vehicle, and was then transported to the Steubenville Police Department where he was formally charged with petty theft. The charge was later amended to receiving stolen property and Mr. Mason was held in the Jefferson County Jail for eleven days before obtaining his release on bond. Ultimately, the Jefferson County grand jury refused to indict him. By then, much, if not all, of the seized property had been disposed of.

On or around August 15, 2014, Mr. Mason's attorney signed and served a subpoena *duces tecum* on Jane M. Hanlin, the Prosecuting Attorney of Jefferson County, Ohio. The subpoena (attached as Exhibit A to Doc. 47) commanded the production of "all documents relevant to the presentation of case of State v. Mason, 13CR000097 to the Jefferson County grand jury, including, but not limited to, the transcript of the grand jury proceedings." When Ms. Hanlin did not produce those documents, Mr. Mason filed a motion for an order requiring her to show cause why she should not be held in contempt. Doc. 47. Ms. Hanlin responded. Doc. 50. Mr. Mason did not file a reply memorandum,

and the issue raised in the motion is now ready for decision. For the following reasons, the motion will be denied.

I. Discussion

Mr. Mason has attached a letter written by Ms. Hanlin in response to the subpoena as an exhibit to his motion. His motion addresses the arguments she raised in her letter. He claims that (1) the documents are clearly relevant to his claims, especially given the fact that much of his property was given away the day he was arraigned on the felony charge, and (2) Ms. Hanlin did not properly support her claim of privilege by preparing a privilege log, as required by Fed.R.Civ.P. 45(d)(2)(a). He also argues that federal law governs the question of whether the documents are, in fact, privileged, and that any rules of Ohio procedure which purport to protect the documents from disclosure are superseded by federal law.

In her response, Prosecutor Hanlin mentions, on the first page, that she cannot respond to the subpoena because she has no responsive documents. That potentially dispositive claim is not, however, supported by an affidavit or declaration, and she does not disclaim the ability to obtain them in her capacity as Prosecuting Attorney. Consequently, the Court will assume that she would be able to respond to the subpoena by producing grand jury documents - an assumption which Ms. Hanlin seems to share, given that the balance of her twelve-page memorandum in opposition never again mentions her alleged inability to comply. The Court also assumes that the resolution of Mr. Mason's claims against the City of Steubenville defendants does not moot this issue, since he has named other defendants in his malicious prosecution count. The Court will therefore examine the merits of Ms. Hanlin's arguments concerning whether the subpoena should be enforced by the Court.

After discussing at some length cases dealing with subpoenas

for federal grand jury transcripts, Ms. Hanlin asserts that the same standards have been applied to state grand jury materials as a measure of comity toward the state criminal justice system. She cites first to a decision from the Seventh Circuit Court of Appeals, Socialist Workers Party v. Grubisic, 619 F.2d 641 (7th Cir. 1980), for this proposition. That decision is worth examining in some detail.

In Grubisic, the police and private party misconduct about which the plaintiffs sued had been investigated by the Cook County Grand Jury. It had issued a report which was very critical of the Chicago Police Department. During the course of the litigation, the plaintiffs issued a subpoena to the State's Attorney for Cook County directing him to release grand jury materials and transcripts. The District Court enforced the subpoena, leading to the appeal addressed in the cited Seventh Circuit opinion.

The court began its analysis by acknowledging, as Mr. Mason argues here, that state law does not control the question of whether the documents can be obtained through discovery issued in the context of a federal court case where a federal question has been raised in the complaint. However, the court found that federal common law also protects state grand jury materials to some extent, stating that "the federal common law, as interpreted in light of reason and experience, accords at least a qualified privilege to the records of state grand jury proceedings ...." Id. at 643. The court further equated the State's interests in preserving the secrecy of these materials to the federal interest, expressed in Fed.R.Crim.P. 6(e), in protecting federal grand jury materials, and concluded that the same test ought to apply whether the grand jury materials had been compiled in the course of federal or state criminal proceedings.

In order to obtain federal grand jury materials in the

context of privately-initiated civil litigation, a party must show "that they are needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request is structured to cover only the material needed." Id. at 644. That determination, according to Grubisic, should be made in the first instance by the state court having supervisory authority over the grand jury in question; the court held that

> when state grand jury proceedings are subject to disclosure, comity dictates that the federal courts defer action on any disclosure requests until the party seeking disclosure shows that the state supervisory court has considered his request and has ruled on the continuing need for secrecy. Otherwise the potential threat of disclosure orders in subsequent federal civil litigation would seriously weaken the state court's control over the secrecy of this essential component of its criminal justice system.

Id. The case was therefore remanded to allow the plaintiffs to conduct the "preliminary stage" of the process by "seek[ing] disclosure through the avenues available to them in the state court," to be followed, if necessary, by additional proceedings in the federal court should that avenue of relief prove unsuccessful. Id.

This approach has been adopted by other Courts of Appeals. See, e.g., Camiolo v. State Farm Fire and Cas. Co., 334 F.3d 345, 357 (3d Cir. 2003)(concluding that a District Judge "should not have" ruled on a motion asking for disclosure of state grand jury materials absent presentation of the question to the appropriate state judicial officer). Further, it has been followed by another Judge of this Court. See Brunson v. City of Dayton, 163 F.Supp.2d 919 (S.D. Ohio 2001). The Court finds these cases persuasive.

The cases are not uniform on how to implement this concept,

however. Some courts have quashed the subpoena, while others have suggested abstaining from the question pending efforts to obtain the materials from the state court. The former is a cleaner approach, especially given the assertion that Ms. Hanlin may not be the proper target of the subpoena. The motion for an order to show cause will therefore be denied and the subpoena will be quashed, without prejudice to the proper service of a subpoena on the correct individual or entity should the state court refuse to release the materials to Mr. Mason.

II. Order

For these reasons, the motion for an order to show cause (Doc. 47) is denied and the subpoena directed to Jefferson County Prosecuting Attorney Jane Hanlin, dated August 15, 2014, is quashed. Ms. Hanlin's request for attorneys' fees in connection with the motion is denied.

III. Procedure on Motion for Reconsideration

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 14-01, pt. IV(C)(3)(a). The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect even if a motion for reconsideration has been filed unless it is stayed by either the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.3.

/s/ Terence P. Kemp
United States Magistrate Judge